

**OPINION
72-238**

May 23, 1972 (OPINION)

Honorable Peter S. Hilleboe

State Representative

Fargo, ND

RE: Motor Vehicles - Registrar - Status of Branch Offices

This is in reply to your letter of May 18, 1972, in which you state the following facts and questions:

"Pursuant to a Motion passed at a special meeting of the Legislative Audit and Fiscal Review Committee in Fargo on May 17, 1972, it is requested that your office issue an opinion at your earliest convenience, answering the following questions:

1. The Motor Vehicle Registrar is authorized under section 37-02-03 (sic) of the North Dakota Century Code (Supplement), to establish branch offices to carry out the laws applicable to this office and department. Are the branch offices established and maintained by the Motor Vehicle Registrar considered a state department or agency, or do the branch offices have the legal status of a private agency or independent contractor?
2. Is the manager-operator of a Motor Vehicle Registrar Branch Office considered a state employee as the term is used in section 54-35.1-02 of the North Dakota Century Code (Supplement), relating to the powers and duties of the Legislative Audit and Fiscal Review Committee?
3. Is the North Dakota State Auditor authorized to make a complete examination and audit of the books, records, accounting methods and internal control of a Motor Vehicle Registrar Branch Office under the powers granted to this department in section 54-10 of the North Dakota Century Code?
4. Is the money received by the Motor Vehicle Registrar Branch Offices for North Dakota license plates and tabs considered 'state funds' under Chapter 6-09-07 of the North Dakota Century Code, or 'public monies' under section 186 of the North Dakota Constitution, and what deposit requirements should be observed with this income by the Motor Vehicle Registrar Branch Offices?"

While your question refers to section 37-02-03, we believe you have reference to section 39-02-03 of the North Dakota Century Code, as amended. This section provides:

POWERS AND DUTIES OF REGISTRAR AND DEPARTMENT. The registrar,

subject to the approval of the governor, may adopt and enforce such administrative rules and regulations and designate such agencies and establish such branch offices as may be necessary to carry out the laws applicable to his office and department. He shall provide suitable forms requisite for the operation of his office and department, and shall repay all transportation charges thereon. The department and the officers thereof shall enforce the provisions of all laws pertaining to the registrar and the motor vehicle department."

The statute as originally enacted in 1927 did not provide for the establishment of branch offices but only authorized the registrar to designate such agencies as may be necessary. See Chapter 179, section 3, 1927 Session Laws. The addition of the words relative to the establishment of branch offices was a result of the 1943 codification of the statutes of the State of North Dakota. The Code Revision Report Covering Work of the Code Revision Commission states with respect to section 39-02-03 of the North Dakota Revised Code of 1943:

"The phrase 'and establish such branch offices' is added to this section for clarity. Branch offices have been established by the motor vehicle department and no doubt the authority to do so was interpreted from the phrase 'designate such agencies.' The phrase 'and establish such branch offices' is added to this section to eliminate all doubt as to the authority of the department to establish such branch offices in accordance with its practice."

The statute was amended and reenacted in 1951 (see chapter 236, section 3, 1951 Session Laws) to change the requirement for approval of the designation of agencies and establishment of branch offices from that of the Highway Commissioner to the Governor. Prior to that time the Highway Commissioner appointed the Motor Vehicle Registrar rather than the Governor. The statute was again amended in 1967 to provide that the Registrar could establish such offices or designate such agencies as necessary to carry out the laws applicable to his "office and department." See Chapter 294, 1967 Session Laws. Prior to that time it had read "chapter" and chapter 39-02 did not really specify the functions of the department, and the amendment was apparently a "housekeeping" amendment. However in each instance the Legislature retained the authority of registrar to designate agencies or establish branch offices.

We have no record of what the 1943 Code Revisor considered to be "branch offices" as distinguished from "agencies." We might conclude as a practical matter that the designation of agencies referred to the designation of existing offices to exercise the functions of the motor vehicle department whereas the establishment of a "branch office" meant the creation of an arm of the motor vehicle registrar for the sole purpose of exercising functions of the motor vehicle department. In this connection we note the statute uses the term "designate such agencies" which would indicate the designation of existing agencies. We must assume the Code Revisors, and the Legislature by the adoption of the Revised Code intended the words "branch office" to mean something other than "agencies" or they would not have added those words to the statute.

However in the legal sense there would appear to be little distinction between the terms. Thus the term "agency" has been defined as the "relationship between parties through which one is authorized to act for another generally or as to specified matters." See, e.g., Meyer Dairy, Inc. v. N.L.R.B. 429 F.2d. 697, 701. It has also been defined as "a legal concept depending upon existence of manifestation by principal that agent shall act for him, agent's acceptance of the undertaking, and the understanding of parties that principal is to be in control of the undertaking." See, e.g., J. R. Watkins Company v. Dutt, 173 N.W.2d. 41, 43; 84 S.D. 453. The term "branch" and the term "agency" are often used synonymously. See, e.g., Cadman Memorial Congregational Soc. of Brooklyn v. Kanyon, 95 N.Y.S. 2d. 133, 155; Lowendahl v. Baltimore and O. R. Company, 287 N.Y.S. 62, 74.

The only formal expression of opinion by this office of which we are aware is an opinion issued to E. K. Sheaffer, Registrar, on October 9, 1945. In that instance Mr. Sheaffer noted he had local registrar agents in a number of towns and cities throughout the State which he required to be bonded with the State Bonding Fund. Some of the agents were county officials. The questions presented were whether the official bond running to the county would be considered sufficient to cover the liability to the motor vehicle department, whether it was necessary to have a separate bond running to the motor vehicle department, and whether it was necessary that an oath of office be filed by these agents with the Secretary of State.

The opinion noted the authority for the appointment of local registrar agents was derived from section 39-02-03. The opinion further stated:

"It is not the duty of the county or other local officials to handle motor vehicle registrations. When such officials are appointed as local registrar agents, they become agents of the motor vehicle registrar upon acceptance of appointment and their duty to remit to him registration license fees is separate and apart from their duties as county and local officials. In other words, when they function as agents for the motor vehicle registrar, their status is not different from that of any other person who has been appointed to act as such agent. Consequently they should be bonded by the state bonding fund as agent of the motor vehicle registrar.

"It is my opinion that such local motor registrar agents are not required to file an oath of office. They should accept such appointment as registrar agents in writing on a suitable form prescribed by the motor vehicle registrar and should agree to remit license fees collected in conformity with the directions of the registrar. In a certain sense, such agents are state employees when they prepare applications for motor vehicle licenses and collect fees for same, but they are not state officials; they merely perform services for the motor vehicle registrar in the same way as a clerk or stenographer perform services for the department or office in which he or she is employed.

"The state insurance commissioner should be notified of the

appointment of every such local registrar as soon as possible after the appointment is made."

While the above quoted opinion does not distinguish between an "agency" and a "branch office", we do not believe, in the legal sense, that there is an appreciable distinction. As noted above, the practical distinction may be that in the case of an agency the registrar designates some existing office or agency to perform functions of the motor vehicle registrar whereas in the case of a branch office he creates an office whose only purpose is to act as agent of the registrar. In the latter instance the branch office would be as much a part of the motor vehicle registrar's office as would the main office. In either instance it would appear the agency or branch office would be an agent of the motor vehicle registrar. We cannot construe section 39-02-03 to authorize the delegation of state functions to an office or individual who would not be acting under the direction of and as an agent of the motor vehicle registrar.

In reply to your first question, it is our opinion that branch offices established and maintained by the motor vehicle registrar are considered a state department or agency insofar as the functions they perform are concerned. We do not believe they would have the legal status of a private agency or independent contractor with respect to the functions performed for the motor vehicle registrar.

With respect to your second question, i. e., is the manager-operator of a motor vehicle registrar branch office considered as a state employee as the term is used in section 54-35.1-02 of the North Dakota Century Code we believe, based on the 1945 opinion of this office quoted herein, that such person would be considered as a state employee for the purpose of that statute.

It is our further opinion that the State Auditor is authorized to make a complete examination and audit of the books, records, accounting methods and internal control of a motor vehicle registrar branch office under the power granted to him by Chapter 54-10 of the North Dakota Century Code.

Your fourth question involves an interpretation of "state funds" as that term is used in section 6-09-07 of the North Dakota Century Code, as amended. That Section provides:

STATE FUNDS MUST BE DEPOSITED IN BANK OF NORTH DAKOTA. All state funds, and funds of all state penal, educational, and industrial institutions shall be deposited in the Bank of North Dakota by the persons having control of such funds or shall be deposited in accordance with constitutional and statutory provisions."

In view of the above discussion we believe the only logical conclusion is that the funds in question are "state funds" within the meaning of section 6-09-07 of the North Dakota Century Code, as amended. We cannot determine that a payment for a motor vehicle license issued pursuant to authority of the state is anything other than state funds.

In reaching these conclusions we must note there as been a varying degree of opinion concerning section 39-02-03. If the statute is deemed ambiguous by a court, the court would consider the practical application given the statute by the persons charged with its administration, i. e., the motor vehicle registrar and the Governor. If that practical application is different from our legal interpretation, the court might nevertheless adopt a construction placed upon it by practical application, having determined that by its nonaction the Legislative has acquiesced in such practical application. This is particularly true if the construction by application predated the last amendment of the statute by the Legislature in 1967 when no change was made in this portion of the state. See, e. g., William v. Weilenman, 143 N.W.2d. 689 (N.D. 1966); Portland Credit Union v. Hauge, 169 N.W.2d. 106 (N.D. 1969). Where criminal action based on the statutes is involved and a statute prescribing a penalty is susceptible of two constructions, the construction most favorable to the defendant is preferred.

In this instance we have not receive the benefit of any information as to the construction placed upon this statute by the motor vehicle registrar over the years since its enactment. We might conclude that the action of the 1943 Code Revisors had the effect of clouding the statute insofar as the questions posed are concerned. We have no information as to the status of the so-called "branch offices" which the revisors concluded were in existence at that time. We do not have any formal information of the status of the present system, including appointments by the registrar, contracts, etc. However we doubt the addition of the phrase "establish such branch offices" was intended to alter the status of any persons acting under the authority of the motor vehicle registrar. We believe the addition of the term was solely for the purpose of permitting the creation of additional offices of the motor vehicle registrar, other than in the Capitol, as opposed to the designation of an already existing agency, such as a county official, for the purpose of performing functions of the motor vehicle registrar. Whether history would substantiate this construction is a fact not presently within our knowledge.

The answers to questions are based solely on the statutory provisions, because we have not been furnished any facts except the raw questions. Every person is charged with knowledge of the law. Even if the manner in which the "branch office" was set up may suggest an intention of attempting to create an independent contractor rather than employer employee relationship. The provisions of the statute would control. The registrar could not act beyond the authority granted. We might add that under any condition the operator of the branch office falls within the position of a trustee regardless of what other relationship may have been intended.

HELGI JOHANNESON

Attorney General